

REMARKS

Pursuant to 37 C.F.R. §1.111, reconsideration of the instant application, as amended herewith, is respectfully requested. Entry of the amendment is requested.

Claims 112-124, 125-130 and 132-136 are presently pending before the Office after the cancellation of claims 125 and 131 herein. Applicant has amended the claims. No new matter has been added. Support for the amendments can be found throughout the specification as originally filed. Applicant is not intending in any manner to narrow the scope of the originally filed claims.

The Examiner's Action mailed July 8, 2005 and the references cited therein have been carefully studied by Applicant and the undersigned counsel. The amendments appearing herein and these explanatory remarks are believed to be fully responsive to the Action. Accordingly, this important patent application is believed to be in condition for allowance.

Relying on 35 U.S.C. §112, second paragraph, the Office has rejected the subject matter of claims 112-135 as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention for the reasons stated in paragraph 4 of the office action. Applicant respectfully traverses the rejection and requests reconsideration.

Applicant submits that the claims do define the legal metes and bounds of the invention. It is not the role of the claims to enable one skilled in the art to reproduce the invention but rather to define, for those skilled in the art the legal metes and bounds of the invention.

It is generally understood in the claims drafting art what the term “substantially” means. However, in order to advance the case to allowance, the claims have been amended to delete the terms referred to by the examiner, which in turn also clarifies the antecedent basis issue raised by the examiner.

It is respectfully submitted that the claims fully comply with 35 U.S.C. §112, second paragraph. Withdrawal of the rejection is respectfully requested.

Relying on 35 U.S.C. §103(a), the Examiner has rejected the subject matter of claims 111-120, 122 and 125 as obvious over Hueschen. Applicant respectfully traverses the rejection and requests reconsideration.

It is evident that Applicant's invention is decidedly different from the teachings of the cited patent, which does not suggest or even mention clusters as disclosed in the present application. The cited reference is in fact not even pertinent and has been misinterpreted and thus misapplied. Accordingly, the Examiner has not established a prima facie case of obviousness.

In particular, the present application deals with gases or liquids (fluids), that is, with substances whose constituents are free to move, while Hueschen deals with solids, that is, with substances in which the constituents are trapped and kept in fixed positions. Therefore, the methods, apparatus and/or principles of clustering for fluids and solids are dramatically different.

The novelty of the present application lies in the methodology for clustering atoms that are dramatically different for fluids and solids. For fluids, the only form of clustering atoms prior to the present application was given by valence bonds resulting in conventional molecules. The present application presents a basically novel method for clustering atoms in a liquid or gas,

where the novelty is based on physical and chemical features structurally different than those of molecules.

The Examiner further states that “spectrometric properties are inherently taught by Hueschen”. This statement has no scientific or other content since solids cannot be subjected to the Gas Chromatographic Mass Spectrometric (GC-MS) analyses for gases or liquids as presented for gases and liquids in the present application. Even assuming that with some manipulation solids are somehow liquified and a new GC-MS is invented so as not to melt for the measurements suggested by the examiner, the alleged clustering of Hueschen will in actuality, show no bond because they are part of a crystal.

The structure disclosed in Hueschen has a crystal bond, it is not molecular or valence. In crystals, atoms have very large distances so bond is neither molecular nor of the type presented in the present invention. Crystals have no infrared signature because of these large distances, not because of a new specie. However, atoms are at short distances in gases and fluids, whether the atoms are bonded together molecules or the new species.

In other words, the cited reference is irrelevant as it deals with crystallized solids, not liquids and gases.

Clearly, in the absence of any suggestion or any teaching whatsoever of how one skilled in the art would attempt to infer or deduce the present inventive species from a reading of the Hueschen reference, one skilled in the art would certainly not find ample motivation to use the disclosure to conclude that the new specie was present in the crystallized solid of Hueschen.

A finding by the Office that a claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made based merely upon finding similar elements (in this case, a mentioning of the principle of clustering in crystallized solids) in a prior

art reference would be "contrary to statute and would defeat the congressional purpose in enacting Title 35." Panduit Corp. v. Dennison Mfg. Co., 1 U.S.P.Q.2d 1593 at 1605 (Fed. Cir. 1987).

Applicant respectfully submits that the Examiner's legal reasoning is flawed. The knowledge of those skilled in the art is derived from the prior art, not from the Examiner's mental impression of what those skilled in the art might or might not know. It is the law as evidenced in Graham v. John Deere that is controlling. As enunciated by the Graham court, §103(a) requires a comparison of the claimed invention with the teachings of the prior art. Otherwise, the PTO could simply say "I'm skilled in the art. That claim is obvious." The rules and the law require that the Examiner point out where in the prior art lies Applicant's claimed invention in the context of what those skilled in the art know. If it is not there, the public is not in possession of the invention, and, therefore, a rejection under 35 U.S.C. §103(a) will not lie.

Accordingly, Applicant respectfully submits that claims 112-124, 126-130 and 132-136, as amended herein, are patentable over the Hueschen patent under 35 U.S.C. §103(a). Withdrawal of the rejection is respectfully requested.

CONCLUSION

As the Federal Circuit observed in Orthopedic Equipment Co. v. United States, 702 F.2d 1005, 217 U.S.P.Q. 193 (Fed. Cir. 1983):

The question of nonobviousness is a simple one to ask, but difficult to answer ... The difficulty which attaches to all honest attempts to answer this question can be attributed to the strong temptation to rely on hindsight while undertaking this evaluation. It is wrong to use the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit. Monday morning quarterbacking is quite improper when resolving the question of nonobviousness ...


Even though the initial claims in this important patent application were drawn to a new, useful and nonobvious invention, they have now been amended to advance the case to allowance.

A Notice of Allowance is earnestly solicited.

If the Office is not fully persuaded as to the merits of Applicant's position, or if an Examiner's Amendment would place the pending claims in condition for allowance, a telephone call to the undersigned at (727) 943-9300 would be appreciated.

Very respectfully,

Dated: 10/3/05


Dennis G. LaPointe
LaPointe Law Group, P.L.
P.O. Box 1294
Tarpon Springs, FL 34688-1294
(727) 943-9300
Reg. No. 40,693